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Nos. 84-28 and 84-143

In The

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ALL APPELLEES

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QUESTIONS PRESENTED

1. Does the definition of "prurient" contained in Washington's obscenity statute — i.e. merely "that which incites lasciviousness or lust" — violate the guarantees for protected expression contained in the First and Fourteenth Amendments to the United States Constitution?

a. Is it constitutionally permissible for an obscenity law to contain no requirement that challenged material be found in violation of community standards of what is deemed shameful, morbid, unhealthy or unwholesome?

b. Is it constitutionally permissible for the term "prurient" in an obscenity law to be defined exclusively in terms of a value-neutral concept meaning nothing more than mere sexual stimulation or the arousal of sexual desire?

c. Is it constitutionally permissible in an obscenity law for the definition of "obscenity" to be similar to that contained in *Regina v. Hicklin*? Specically, does the lack of a requirement that the value judgments of the average person in the community be applied to the material "taken as a whole" rather than only to isolated excerpts comply with First Amendment standards?

d. Is it constitutionally permissible to define the term "prurient" exclusively in terms of the words "lasciviousness" or "lust," the predominant if not exclusive contemporary meaning of which is the value-neutral one of mere physical sexual arousal involving no necessary notion of disapproval, shamefulness or morbidity?

2. Is a First Amendment facial overbre 'th challenge to an obscenity law permissible where, as in the case at bar, all of the following circumstances are present:

a. An integral portion of the definition of obscenity which will necessarily be involved in *every* application of the statute is unconstitutional, both on its face and as interpreted by appellants, the state authorities charged with its enforcement;

b. There are *no* circumstances where the statute may be constitutionally applied because of its unconstitutional definition;

c. The statute establishes *severe* penalties for its violation including *unlimited* civil fines and criminal penalties including five year felony imprisonment, a *mandatory minimum* fine of $5,000.00 and a maximum fine of $50,000.00 for *each copy* of each distributed item found to be obscene;

d. The parties challenging the statute are asserting their own rights and not those of hypothetical non-litigant third parties.

3. Does a federal court abuse its discretion if it refuses to invoke *"Pullman"* abstention where plaintiffs challenging a facially unambiguous obscenity law allege that it infringes on protected First Amendment expression, where the challenge involves no uncertain issue of state law, where all parties (including the State's Attorney General) agree as to the legislature's intended meaning of the statute, and where, because of the law's severe penalty provisions, its overbreadth would have an extreme deterrent impact on protected expression until such time, if ever, as a saving state court construction is rendered?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington; JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington; JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington; FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington; and NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; AND THE COMMUNITY COLLEGE LIBRARIAN and MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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BRIEF FOR ALL APPELLEES

STATEMENT OF THE CASE

Appellees concur in the Statement of the Case contained in appellant Brockett's brief except for the sentence beginning on p. 6 and ending on p. 7 thereof, contending that the Court of Appeals compelled "only one" constitutionally acceptable definition of "prurient." While the Court of Appeals did conclude that "prurient interest"

means "a shameful or morbid interest in nudity, sex or excretion," the Court did not have before it, nor did it purport to reject, synonyms such as an "unhealthy" or "unwholesome" interest, which might be acceptable in a statutory definition of "prurient interest." Similarly, the Court of Appeals also did not disapprove legislation wherein "prurient interest" was left undefined.

Appellees also concur in parts A and B of the Statement of the Case in the Eikenberry brief but add that the penalty for violation of the Class C felony of "promoting pornography" is a maximum five-year prison sentence (per count) [*see* R.C.W. § 9A.20.020(1) (c) (as amended, 1981)] and a *mandatory minimum* fine of $5,000 *per count* with a potential maximum fine of $50,000 *per count* [*see* § 8 of House Bill 626 forth in Appendix A hereto].

Regarding the discussion of the Court of Appeals' opinion contained in part C of the Eikenberry brief's Statement of the Case, appellees assert the following:

1. The Court of Appeals, as noted by Eikenberry, "found that the connotations associated with the term 'lust' in 1957 were not necessarily applicable today." However, the Court of Appeals' support for this observation was somewhat broader than the reasons set forth in the Eikenberry brief. Specifically, the Court of Appeals noted that "the term 'lust' is generally perceived today" as "a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490-491 (9th Cir. 1984). The Court noted:

> "To the contemporary jury, 'lust' is unlikely to connote anything more than 'sexual desire.' *Webster's Third New International Dictionary* (Unabridged, 3d Ed., 1976); *see also The Random House Dictionary of*

the English Language (Unabridged, 1979) ('lust' defined as 'sexual desire or appetite')." 725 F.2d at 491.

2. After concluding that a contemporary jury given a mere "lust" instruction would not necessarily find the material shameful, morbid or unwholesome, the Court then relied upon substantial precedent holding that a "prurient" interest, as used in *Roth* and *Miller,* necessarily connotes an interest that is not only erotic, but is, in some way, shameful, morbid, unwholesome or unhealthy. Relying on the opinion in *United States v. 35 MM Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705 (2nd Cir. 1970) *cert. denied,* 403 U.S. 925 (1971), the Court of Appeals stated:

> "We agree with the Second Circuit's conclusion 'that the Supreme Court has never intended to brand as "obscene" representations of sexual matters which do not import a debasing, "shameful or morbid" quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow "dirty" or unspeakably offensive.' [Citation omitted.] Such an argument is degrading, and, like the Second Circuit, we reject it. * * * Only by distinguishing between 'the arousal of sexual instincts and the perversion of those instincts to morbidity,' 432 F.2d at 712, can we ever hope to safeguard from state intrusion the already 'dim and uncertain' boundary surrounding protected First Amendment expression." 725 F.2d at 491-492.

3. Thereafter, the Court of Appeals disposed of appellants' *Pullman* abstention argument with the following discussion:

> "In this case, we find it crystal clear that the term 'prurient' as used in House Bill 626, includes 'lust.' It is not possible, under the statute, to give the term a

contrary meaning. The statute expressly incorporates the term 'lust' in its definition of 'prurient.' Consequently, a state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope.

Since the state statute is not obviously susceptible to an interpretation that will avoid the federal constitutional issue raised by plaintiffs, it is our duty to decide the constitutional question presented. *See,* e.g., *Zwickler v. Koota,* 389 U.S. at 250-51, 88 S.Ct. at 396-97. *See also Aptheker v. Sec'y of State,* 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964) (statute held invalid because '[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting.'); . . . ." 725 F.2d at 493.

4. Finally, the Court addressed the question of whether plaintiffs had standing to bring an anticipatory challenge to the Washington statute based upon the overly broad definition of "prurient interest." See 725 F.2d at 485-487. Concluding that a facial challenge was permissible, the Court articulated its reasoning:

"To begin with, First Amendment freedoms 'are delicate and vulnerable' and the very 'threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). • • •

"Second, facial challenges are necessary because the alternative of awaiting the outcome of individual prosecutions in state courts does not adequately protect First Amendment freedoms. Aside from the enormously high costs and lengthy delays involved [citations omitted], a person thinking of engaging in protected behavior may be deterred from acting by the risk of conviction, even though his challenge might eventually be upheld. Consequently, the chill on protected activity deters those whose legal challenges are

> necessary to narrow an overly broad statute. Absent facial challenges to overbreadth, then, 'the contours of [a statute] would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the [statute's] proper scope.' *Dombrowski v. Pfister,* 380 U.S. at 487, 85 S.Ct. at 1121." 725 F.2d at 486.

Thereafter, the Court concluded that it was unnecessary for it to determine whether the statutory challenge met *Broadrick's* requirement of "substantial overbreadth" because the present case was "a challenge to a statute regulating pure speech" rather than to a statute regulating *both* speech and unprotected conduct. 725 F.2d at 487. Nothing in the Court's opinion remotely suggests that the challenge was *in*substantial or applicable to only a small number of cases. Quite to the contrary, the Court's discussion of the merits of the "prurient interest" issue makes clear that it deemed the statute to be substantially overbroad in that, in *every case,* juries[1] will be instructed under a definition which affords less protection to a defendant than that to which he or she is constitutionally entitled.

SUMMARY OF ARGUMENT

A. "Prurient Interest".

Section 1 (8) of Washington's Obscenity Statute ["the Statute"] defines "prurient" as "that which incites lasciviousness or lust." Accordingly, on its face, the Statute re-

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[1] The terms "juries," "jury" and "jurors" will be used herein as representative of all those whose decisions under the statute will be affected by its overbroad definition of "prurient." *All* others required to apply the statute—e.g., police, prosecutors and judges—will be similarly required to reach beyond constitutional limits. *See, Kolender v. Lawson,* — U.S. —, —, 103 S.Ct. 1855, 1858-1859 (1983).

quires juries to find that the first part of the 3-pronged test for obscenity is met if a viewer of the materials would experience a feeling of *either "lasciviousness"* or *"lust."* Whether there presently exists a commonly understood definition of "lust" or "lasciviousness" which necessarily implies a shameful, morbid, unhealthy or unwholesome interest, it is indisputable that at least one, if not the predominant or exclusive, understanding of those words in today's society is a value-neutral one, indicating mere physiological sexual arousal or desire. Thus, the Statute authorizes instructions which permit jurors to omit any necessary finding that the materials are deemed to be shameful, morbid, unhealthy or unwholesome as viewed by the average citizen in the community. Additionally, as indicated in their briefs, all appellants agree that the statutory term "prurient interest" means a "value-neutral" concept of mere physiological sexual stimulation or arousal.

As pointed out in the Solicitor General's amicus brief,[2] an obscenity statute violates the First Amendment if it fails to require a finding that the materials, taken as a whole, appeal to an unhealthy, unwholesome, shameful or morbid interest in nudity, sex or excretion. This Court's cases have consistently so held as has virtually every lower court to have addressed the issue.

Even more significantly, the Statute, in essence, suffers from many of the same constitutional defects as the English common law definition of obscenity embodied in

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[2] Appellees will consider only the Solicitor General's amicus brief of the many filed in connection with this appeal. Subsequent references to "Amicus" pertain exclusively to the Solicitor General and/or to his brief.

the rejected case of *Regina v. Hicklin,* L.R. 3 Queen's Bench 360 (1868). Under *Hicklin,* material was judged by the effect of *isolated excerpts* on the community's *most susceptible* viewer.

In order to reach an accommodation between the First Amendment's guarantee of free expression and society's interest in prohibiting obscene material, this Court in *Roth v. United States* [354 U.S. 476 (1957)], *rejected* the *Hicklin* obscenity test because its application would have too greatly restricted free expression. Specifically, *Roth rejected* the notion that obscenity could be determined by the effect of *isolated excerpts* within a given work. Instead, *Roth* held that *community standards* must be applied to the material *when viewed as a whole.*

Roth's requirement that community values be applied to the material when *viewed as a whole* was subsequently embodied in the "(a)" prong of the presently prevailing test for obscenity[3] set forth in *Miller v. California,* 413 U.S. 15 (1973). This requirement is not, however, reflected in the "(b)" prong of the *Miller* test because that prong does not require that the material be viewed "taken as a whole."

The Statute has eliminated the crucial requirement that the values of the community be applied to the material when the material is viewed *as a whole.*

Specifically, Washington has defined "prurient interest" exclusively in terms of a *value-neutral* concept of simple sexual stimulation or physiological arousal. Un-

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[3] Appellees' references to the "a," "b" and "c" prongs of the obscenity test pertain to the "prurient appeal," "patently offensive depiction" and "serious value" portions, respectively, of *Miller's* three part obscenity definition.

der the Statute, the "(a)" prong no longer fulfills the function of determining whether the material, taken as a whole, violates the values of the community. Appellants maintain that this is permissible because, they assert, these values are present in the Statute's "(b)" prong. However, neither *Miller* nor the Statute requires jurors to view the material "taken as a whole" when applying the "(b)" prong of the test for obscenity. To the contrary, community judgments of "patent offensiveness" are only applied with reference to *particular depictions* of sexual acts contained within a book, film or magazine, etc., and not to the *whole* of the work.

Since the (b) prong of the test does not purport, nor was it ever intended, to apply to the material "taken as a whole", the only place where community value judgments can be applied *when viewing the material taken as a whole* is in the "(a)" prong of the test. By eliminating the community's value judgments from the "(a)" prong of the test, Washington has enacted a scheme whereby community value judgments only come into play (under the "(b)" prong) when viewing *isolated excerpts* depicting sexual activity within a given work. This is *precisely* what this Court condemned in *Roth* by rejecting the test embodied in *Regina v. Hicklin, supra.*

B. Overbreadth.

Contrary to appellants' assertions, appellees' standing is based upon the statutory threat to *their own* First Amendment rights, rather than the rights of non-litigant third parties. Appellees therefore rely on "traditional" notions of standing rather than the "third party overbreadth standing" discussed in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

Even if this Court concludes that the *Broadrick* "substantial overbreadth" requirement is applicable in the present case, appellees' challenge satisfies its requirements because, *in every case*, police will arrest, prosecutors will prosecute, and judges and juries will try defendants pursuant to a definition of obscenity which gives the potential defendant and the charged material less protection than guaranteed by the First Amendment. There are simply *no* circumstances in which this Statute may constitutionally be applied.

Moreover, this Court has previously held that "substantiality" [for purposes of overbreadth analysis] is also determined, in part, by the *degree of penalty* imposed by the challenged law. [*See New York v. Ferber*, — U.S. —, —, 102 S.Ct. 3348, 3363 (1982).] Unlike the situation in *Broadrick, supra*, [where the primary penalty for violation of the statute was dismissal from state employment—undisclosed "possible criminal sanctions" were also theoretically available], the Statute authorizes *unlimited* civil fines and *quite* substantial criminal *felony* penalties including a potential 5 year prison sentence (per count) and a statutorily required *mandatory minimum* fine of $5,000 *per count*, as well as a potential maximum fine of $50,000 *per count!* These extraordinarily *severe* penalties, coupled with an overly broad definition of obscenity, have a more than substantial chilling effect on appellees' exercise of their rights of free speech.

For all these reasons, should this Court apply the *Broadrick* test, it is nonetheless surely met herein.

C. Pullman Abstention.

Abstention under the doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is inapplicable in this case because none of the parties disputes the intended meaning of the statutory terms "lasciviousness" or "lust," nor is the statute vague or readily susceptible to a state court construction absent a substantial judicial rewriting of the statute. While a construction that reads "black" to mean "white" is always possible in *any* case, this Court has consistently held that the mere abstract possibility of a state court's rewriting its statute is not a sufficient reason to preclude a federal court from exercising jurisdiction over a federal question squarely presented. Moreover, since appellants' position in this Court is that the proper definition of "lasciviousness or lust" in the Washington statute is a "value-neutral" term meaning mere physical "sexual stimulation," there is little likelihood that, as a matter of statutory construction, a state court would adopt a different interpretation of the statute.

Furthermore, where, as here, civil rights plaintiffs allege that a challenged statute infringes and chills their First Amendment rights of free speech, this Court has consistently held that *Pullman* abstention is even less warranted because of the possibility that First Amendment rights will be chilled or destroyed during the period when a state court construction is being sought.

Finally, *Pullman* abstention is particularly inappropriate in a case of this type because this Court has held that even after a federal court has issued a *final* judgment enjoining enforcement of a statute, a state may bring a state court civil declaratory judgment action to seek a narrowing construction of the state statute and then re-

turn to federal court to seek a modification of the permanent injunction. Under this procedure, appropriate comity is achieved between the interests of the state in having an enforceable law and the interests of plaintiffs in protecting their First Amendment rights pending the ultimate resolution of all issues.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WASHINGTON'S OBSCENITY STATUTE VIOLATES THE GUARANTEES OF THE FIRST AMENDMENT.

A. The Positions of the Parties.

In this Court, appellants argue (1) that the constitutionally required concept of "prurient interest" does *not* involve a necessary element of shamefulness or morbidity (as perceived by the average person in the community applying contemporary standards) and (2) that the statutory definition of "prurient interest" as "lasciviousness or lust" was intended to eliminate any necessary finding of shamefulness or morbidity and, instead, to require only a finding of mere sexual arousal or stimulation. See the Eikenberry brief at p. 15:

> "'Prurient' thus means *that which incites sexual stimulation*. The statute should be read as the Washington legislature intended it to be read . . . ." (Emphasis added.)

Also, see the Brockett brief at p. 23:

> "The required appeal must heighten, exacerbate, or otherwise stimulate sexual longing or desire, without regard to whether the stimulated desire is wholesome or not . . . ."

Thereafter, at pp. 28-29, Brockett states:

> "The definition of 'prurient' found in Washington's anti-obscenity law, H.B. 626, meets the purpose of this prong by providing a textual definition towards physical stimulation, arousal, or a non-cognitive interest in sex."

Contrary to the requirements of both *Roth* and *Miller* that the values of the community be reflected in the application of the "prurient interest" portion of the test for obscenity, Brockett argues herein that "[t]he 'pruriency' factor is, therefore, value-neutral . . . ." [Brockett brief at 14.]

In sharp contrast to the position taken by appellants in this Court, the Solicitor General argues that the term "prurient interest" is constitutionally required to convey the concept of a "shameful or morbid" interest:

> "Any . . . formulation of the concept of 'prurience' [similar to that of the Model Penal Code] is acceptable, *as long as it connotes an unhealthy or unwholesome interest in sex.*" (Emphasis added.) Amicus' brief at 11.

However, contrary to the position taken by appellants, Amicus concludes that the statutory term "lust" *necessarily* will somehow be understood by the average juror as a "shameful or morbid interest."

Appellees agree with Amicus that the First Amendment requires that "prurient interest" must mean an interest in sex, nudity or excretion that is viewed as shameful, morbid, unhealthy or unwholesome by the average

citizen applying contemporary community standards. However, appellees disagree with Amicus' additional assertion that the unqualified terms "lasciviousness" or "lust" necessarily convey the concept of an unhealthy, unwholesome, shameful or morbid interest in sex to the average juror. Rather, it is appellees' position that both of these words are now commonly understood as "value-neutral" concepts meaning mere sexual arousal or physical stimulation. For this reason, appellees *concur* in appellants' position that the Legislature did not intend the statutory definition of "prurient" to convey any concept of shamefulness, morbidity, or other violation of community standards.

Whatever meaning the words "lasciviousness" and "lust" might be intended to convey in a hypothetical statute not before this Court, their meaning in *this* case is *fixed* by the interpretation given them by the Attorney General and the other appellants who read (and presumably intend to enforce) these terms as "value-neutral" concepts meaning mere "sexual stimulation" or "physical arousal" without any requirement of shamefulness or morbidity. Appellees submit that this Court must consider the meaning of the statutory term "prurient interest" (at least for purposes of this case) congruent with the way in which it is threatened to be enforced. Accordingly, appellees submit that the only issue properly before the Court in this case is whether it is constitutionally permissible for a state to define the term "prurient interest" exclusively in terms of mere value-neutral "physical sexual arousal" without any required consideration by the jury of whether the materials would be considered shameful or morbid in light of contemporary community standards.

Accordingly, there is no need for this Court to consider the separate issue raised by Amicus of whether the terms "lasciviousness" or "lust," might be deemed necessarily to include the concepts of shamefulness or morbidity should the issue ever arise in connection with *federal* obscenity legislation.

B. The Court of Appeals' Conclusion That a "Prurient Interest" is a "Shameful or Morbid" Interest Reflective of Each Community's Unique Values and Mores, is Compelled By The Present Status of the Law of Obscenity Vis-A-Vis the Term "Prurient Interest."

The Court of Appeals' conclusion that the term "prurient interest" was intended to communicate an erotic appeal which goes beyond the values of the community (i.e. beyond contemporary community standards as to what is or is not "shameful or morbid") is consistent with all of this Court's prior decisions, with the decisions of the numerous lower federal courts which have specifically addressed this issue, with the historical concept of obscenity as a "compromise between candor and 'shame'," with the A.L.I. Model Penal Code definition of obscenity and with the statutory definitions of obscenity of all but three of the 50 states.

This Court's first treatment of the subject of "prurient interest" appeared in its landmark *Roth* opinion. In *Roth*, this Court for the first time held that "obscenity" constituted expression not protected by the First and Fourteenth Amendments to the United States Constitution. However, in words particularly apposite to the present case, this Court cautioned:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-

> being of our free society and are indispensible to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. *It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.*" (Emphasis added) *Roth, supra,* 354 U.S. at 488.

The foregoing language indicates that at the time of *Roth* this Court considered the concept of "prurient interest" to be the primary determinant separating "obscenity" from constitutionally protected "speech" and that sexually oriented material *would* be protected if it did "not treat sex in a manner appealing to prurient interest." *Id.*

Although appellants contend that the constitutional concept of "prurient interest" is a "value-neutral" one involving mere "physical sexual stimulation" and nothing more, a careful reading of *Roth* does not support their position. First of all, *Roth* stated that "prurient interest" was to be measured by "contemporary community standards."[4] It is extremely significant to observe that when *Roth* first coined the concept of "contemporary community standards," there did not exist the subsequently added "patently offensive" portion of the test for obscenity. This is significant because it means that *Roth must* have intend-

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[4] The *Roth* test for obscenity was stated in the following terms: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489.

ed the concept of "prurient interest" to incorporate community value judgments of wholesomeness, etc., *because there was then no other prong of the test through which community value judgments might be applied!*

Indeed, the *Roth* opinion quoted with approval that portion of the trial court's jury instructions which stated to the jurors that "you and you alone are the exclusive judges of what the *common conscience of the community is,* and in determining that *conscience* you are to consider the community as a whole . . . ." 354 U.S. at 490 (emphasis added). The use of the term "common *conscience* of the community" is very instructive because it indicates that the referenced contemporary community standards were to reflect community *values.* Since the *only* application of the contemporary community standards requirement in *Roth* was to the concept of "prurient interest," the language referring to the "common conscience of the community" necessarily refutes appellants' argument that community attitudes and values play no part in the meaning of "prurient interest."

Further refutation of appellants' position comes from *Roth's* footnote 20. While appellants argue that "shamefulness and morbidity" play no constitutionally required part in the definition of "prurient interest," footnote 20 of *Roth expressly approved* the American Law Institute's Model Penal Code definition of obscenity defining "prurient interest" as "a shameful or morbid interest in nudity, sex, or excretion . . . ." 354 U.S at 487, n. 20. Accordingly, no matter what else might be said of this footnote, it expressly and necessarily recognized that shamefulness

and/or morbidity constituted *at least* one essential element of the meaning of "prurient interest."

Appellants make much of the first sentence of footnote 20 in *Roth* which recites a dictionary definition of "prurient interest" as "material having a tendency to excite lustful thoughts." However, a close reading of footnote 20 reveals that this Court's aim was to list not only the then-current dictionary definitions of "prurient," but also to discuss the judicial meaning given to that term in the "case law." This Court then *concluded* the footnote by approving the Model Penal Code definition, indicating that it does not significantly differ from that found in the "case law." However, at the end of footnote 20, as discussed *infra,* this Court referred to two pages[5] from the comments to the tentative draft of the Model Penal Code that make it quite clear that the Court understood that the A.L.I. definition was *substantially different* from the *dictionary definitions* appearing at the beginning of footnote 20 even though the A.L.I. definition was *not* considered substantially different from the "case law" definitions. In sum, it seems that this Court's inclusion of the world "lust" in footnote 20 was merely to show that "lust" or "sexual desire" was considered to be one of the necessary elements *subsumed* within the Model Penal Code definition. However, as indicated by the comments at page 10 of the tentative draft of the Model Penal Code (referred to at the conclusion of footnote 20), the concept of a "lustful interest," standing alone, was *rejected* as insufficient for the safeguarding of protected liberties.

The crucial language from the comments to the tentative draft which makes sense of the otherwise confusing footnote 20 is set out below:

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[5] Pages 10 and 29.

> "Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters . . . . *We reject the prevailing test of tendency to arouse lustful thoughts or desires* because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art . . . . * * * On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a *forbidden* look behind the curtain of privacy *which our customs draw* about sexual matters." (Emphasis added.) A.L.I. Model Penal Code, § 207.10 (Tent. Draft No. 6, 1957), comment at 10.

The referenced language at p. 29 of the comments is even more supportive:

> "In specifying that the appeal must be to *prurient* interest, the proposed definition recognizes that there is a normal interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. The prurient interest is an *exacerbated, morbid, or perverted interest* . . . ." [Emphasis in original.] A.L.I. Model Penal Code, § 207.10 (Tent.Draft No. 6, 1957), comment at 29.

The reference to these crucial A.L.I. comments by the Court in *Roth* make it clear that this Court *rejected* any definition of "prurient interest" (such as Washington's) based *exclusively* on "lustful thoughts or desires." Rather, this Court included these comments to make clear that thereafter "prurient interest" should be understood to be a legal term of art meaning a shameful, morbid or "perverted" interest. Viewed in light of the A.L.I.'s emphatic *rejection* of a definition of "prurient interest" based *exclusively* on "lust," *supra,* the only plausible explanation of the term "lustful thoughts" appearing at the beginning of footnote 20 is that this Court concluded that a "lust com-

ponent" was *subsumed* within the approved A.L.I. definition of a shameful or morbid interest in sex.

In 1970, three years before this Court's landmark *Miller* decision, the Court of Appeals for the Second Circuit faced an argument identical to appellants' herein, i.e., that material appealing to a "prurient interest" need only have a sexually arousing impact and need not be found to appeal to a "shameful or morbid" interest. After analyzing footnote 20 in *Roth*, the Court similarly concluded that *Roth* had prospectively adopted the Model Penal Code definition:

> "We conclude, therefore, that the Supreme Court has never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow 'dirty' or unspeakably offensive. There is no logic in such a position, and we reject it." *United States v. 35 MM Motion Picture Film Entitled "Language of Love,"* 432 F.2d 705, 711 (2nd Cir. 1970).

Indeed, the facts in *Language of Love* indicate just how important is the distinction here at issue. The Court noted that all of the expert witnesses testified that none of the scenes of sexual activity in *"Language of Love"* appealed to a morbid or shameful interest in nudity or sex. 432 F.2d at 711. Nonetheless, the Court of Appeals viewed the film and observed that "[t]o the average person, certain scenes in *"Language of Love"* may present a temporary erotic appeal, and the effect may be temporary sexual arousal." *Id.* In ruling that the film was constitutionally protected, the Court concluded:

> "The erotic instinct and the apparent desire for sex education are in the ascendancy in our society, and in the sensitive area of constitutional adjudication of individual rights *we must be careful to distinguish between the arousal of sexual instincts and the perversion of those instincts to morbidity.* That, we believe, is essential to the wisdom of the Supreme Court's attempts to keep the 'door barring federal and state intrusion into [the area of First Amendment freedoms] tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests' . . . ." (Emphasis added) 432 F.2d at 712.

In 1973, this Court accomplished the monumental task of articulating, for the first time since *Roth,* a definition of obscenity concurred in by a majority. Under *Miller,* the new test was defined as follows:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra,* 408 U.S. at 230, *quoting Roth v. United States, supra,* 354 U.S. at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political or scientific value." (Emphasis added) 413 U.S. at 24.

Although the meaning of the term "prurient interest" was not the focus of this Court's concern in *Miller,* nonetheless, two key portions of this Court's opinion indicate the correctness of those courts which have concluded that the term "prurient interest" was intended, in the constitutional sense, as an interest considered "shameful or morbid" in light of contemporary community standards. Firstly, the final sentence of footnote 2 of the *Miller* opinion refers with apparent approval to the A.L.I. Model Penal

Code's definition of obscenity contained in § 251.4(1) of the 1962 official draft:

> "§ 251.4 Obscenity
>
> (1) *Obscene Defined.* Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, *a shameful or morbid interest,* in nudity, sex or excretion . . . ." (Emphasis added). A.L.I. Model Penal Code § 251.4(1) (Official Draft, 1962).

Nowhere in *Miller* are any of the component elements of "prurient interest" from *Roth's* footnote 20 mentioned, nor is any definition of "prurient interest" mentioned other than the Model Penal Code's.

Secondly, in footnote 15 of the *Miller* opinion, this Court quotes with approval from Chief Justice Warren's concurring opinion in *Roth.* Appellees submit that this footnote strongly supports their foregoing interpretation of *Roth's* footnote 20:

> "In the apt words of Mr. Chief Justice Warren, the appellant in this case was 'plainly engaged in the commercial exploitation *of the morbid and shameful craving* for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. *That is all that these cases present to us, and that is all we need to decide.' Roth v. United States, supra,* 354 U.S. at 496 (concurring opinion)." (Emphasis added), *Miller v. California, supra,* 413 U.S. at 35, n. 15.

It is apparent that both Chief Justice Warren in *Roth,* and the majority of the Court in *Miller,* concluded that the *Roth* opinion necessarily was based upon the assumption that juries should make an evaluation of whether the materials in any obscenity case are "morbid and shameful" as measured by contemporary community standards.

Further support for the Court of Appeals' opinion is derived from *Smith v. United States,* 431 U.S. 291 (1977) where this Court focused extensively on the concept of "contemporary community standards." Although appellants herein contend that community value judgments should play no necessary part in evaluating "prurient interest," they cannot dispute that this Court unambiguously held in *Miller,* and reaffirmed in *Smith, supra,* that community standards *must* be considered in connection with *both* the "prurient interest" *and* "patent offensiveness" portions of the *Miller* test. However, if "prurient interest" means nothing more than mere "sexual stimulation or physical arousal" (as suggested by appellants) then the term "community *standards*" becomes mere surplusage vis-a-vis the concept of "prurient interest."

When *Miller* discussed the significance of "community *standards,*" it pointed out:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City." (Emphasis added), *Miller v. California, supra,* 314 U.S. at 32.

Clearly, the community standards discussed in this portion of *Miller* were standards of community *toleration* of material. Obviously, what is deemed "tolerable" was to be gauged by applying the differing *attitudes* and *values* existing in different communities throughout the country.

Similarly, in *Smith v. United States, supra,* this Court pointed out that its opinion in *Hamling v. United States* [418 U.S. 87, 104-105 (1974)] recognized that

> "the function of 'contemporary community standards' in obscenity cases[, like] 'reasonableness' in other

> cases[, is that it entitles a juror] to draw on his own knowledge of *the views* of the average person in the community . . . ." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 302.

Obviously, the phrase "the views" as used in this quotation refers to a "value laden" judgment based upon the values of the vicinage. [By contrast, appellants' definition of "prurient interest" dispenses entirely with the values of the community vis-a-vis the "prurient interest" portion of the test.] This Court's Smith opinion then points out that these community "views" are just as pertinent to the "prurient interest" portion of the test as they are to the "patent offensiveness" portion of the test:

> "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard *of appeal to prurient interest* or patent offensiveness, if it were even possible for such a definition to be formulated." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 302.

After recognizing that community standards of "prurient interest" and "patent offensiveness" are questions for the jury to decide in its traditional role as fact finder" (431 U.S. at 308), *Smith* upheld the trial court's evidentiary ruling allowing the jury to be informed that Iowa's *state* obscenity statute prohibited obscenity only if sold or exhibited to minors. This Court concluded that the local statute was relevant to the question of "contemporary community standards" because it "provides relevant evidence *of the mores of the community* whose legislative body enacted the law." (Emphasis added) 431 U.S. at 307-308.

In summary, this Court's opinions have consistently treated the concept of "contemporary community stan-

dards" as involving value judgments based upon community mores and have consistently held that these standards should be considered with reference to the question of whether material appeals to a "prurient interest." Since the concept of "contemporary community standards" originated in *Roth*, long before there was any requirement for a finding of "patent offensiveness," there can be no question that community value judgments have always been deemed necessarily inherent in the concept of "prurient interest."

The foregoing conclusion has also been reached by every lower federal court and the vast majority of state courts which have considered this issue. *See*, e.g., *United States v. 35 MM Motion Picture Film Entitled "Language of Love," supra*, 432 F.2d 705, 711-712 (2nd Cir. 1970) [where the Second Circuit concluded that this Court's use of the term "prurient interest" was "never intended to brand as 'obscene' representations of sexual matters which do not import a debasing, 'shameful or morbid' quality into the expression or depiction of human sexuality"]; *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363-1364 (5th Cir. 1980) [interpreting *Roth* and *Miller* as adopting the A.L.I. Model Penal Code definition of "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion."]; *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981), *cert. denied sub nom Theatres West, Inc. v. Holmes*, 455 U.S. 913 (1982) [sustaining against constitutional challenge a Texas statute using the term "prurient interest" without further definition but, nonetheless agreeing that that term in fact means "shameful and morbid"]; *Haldeman v. United States*, 340 F.2d 59, 62, n. 5 (10th Cir. 1965) [concluding that *Roth* required that a "prurient interest" be defined as a "shameful or

morbid interest in sex" and applying that definition in prosecution under the *federal* obscenity statute]; *United States v. Hamling,* 481 F.2d 307, 321 (9th Cir. 1973), aff'd, 418 U.S. 87 (1974) [jury instructed that a "prurient interest" is a "shameful or morbid interest in sex" in prosecution under federal obscenity statute]; *Goldstein v. Allain,* 568 F.Supp. 1377, 1385-1386 (N.D. Miss. 1983) [preliminary injunction issued enjoining enforcement of new Mississippi obscenity statute defining "prurient interest," *inter alia,* as merely a "lustful" or "erotic" interest]; *Community Television of Utah v. Roy City,* 555 F. Supp. 1164, 1169, n. 23 (D. Utah 1982) [distinguishing between the term "prurient interest" used in *Miller* and the term "arousing sexual interest" used in the ordinance stricken in that case]; *Little Store, Inc. v. State of Maryland,* 453 A.2d 1215 (Md. 1983) [reversing an obscenity conviction where the trial court's jury instructions defined "prurient" as a "tendency to excite [a] normal lustful interest in sex," *id.* at 1217]; *Leach v. American Booksellers Ass'n., Inc.,* 582 S.W.2d 738, 749-750 (Tenn. 1979) [concluding that *Roth* and *Miller, supra,* used the term "prurient interest" with reference to an interest in sex which was considered either "shameful or morbid"]; *State of Kansas v. The Great American Theatre Co.,* 227 Kan. 633, 608 P.2d 951 (1980) [where the Kansas Supreme Court, in rejecting a proposed jury instruction which would have defined prurient interest exclusively as "an appeal to sexual desire" concluded that this Court "meant something more than merely an appeal to sexual desires when it discussed the element of prurient appeal," *id.* at 640]; and *Andrews v. State of Texas,* 652 S.W.2d 370, 389 (Tex.Cr.App. 1983) [concluding that a properly instructed jury in Texas — where the statutory term "prurient interest" is undefined — would have to

make a finding that the material appeals to "such a shameful or morbid interest in sex as to be prurient," *id.* at 389]. *See also* 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 62.06 (3d ed. 1977) ["the principal appeal • • • must be to a morbid interest in sex, as distinguished from a candid interest in sex"].

Similarly, the Court of Appeals' ruling below is also consistent with this Court's recognition that the historical conception of obscenity is "the present critical point in the compromise between candor and *shame* at which the community may have arrived here and now." (Emphasis added), *Smith v. United States, supra,* 431 U.S. at 301, n. 7, quoting from *United States v. Kennerley,* 209 F. 119, 121 (S.D.N.Y. 1913) (L. Hand, J.). *See also,* e.g., the concurring opinion of Justice Harlan in *Smith v. California,* 361 U.S. 147, 171, n. 2 (1959) and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d 132, 137 (2nd Cir. 1983).

Similarly, the Court of Appeals' ruling is consistent with every A.L.I. Model Penal Code draft definition of "prurient interest" since *Roth.*

The Court of Appeals' determination that a "prurient" interest is not the same as mere "sexual arousal" is also supported by the statutes of a vast majority of the 50 states. While many state statutes define a "prurient interest" specifically as a "shameful or morbid" interest,[6]

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[6] *See,* e.g., Cal. Penal Code § 311(a); Fla. Stats. Ann. § 847.07(2) (a); Code of Ga. Ann. §26-2101(b) (1) [but *see Spry v. State,* 156 Ga.App. 74, 274 S.E.2d 2, 5 (1980) purporting to permit a jury instruction simply using the term "lust"]; Idaho Code § 18-4101(B); Ill. Ann. Stats. Chapt. 38, § 11-20(b); Code of Laws of S.C. § 16-15-260(b); S.D. Codified Laws § 22-24-27 (12); Tenn. Code Ann. § 39-6-1101(8) and Code of Va. § 18.2-372.

the majority of state statutes (either as written or as construed) include the term "prurient interest" but leave it undefined.[7]

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[7] Unless otherwise noted, all of the following states have obscenity statutes which, either as written or as authoritatively construed, utilize the phrase "prurient interest" but do not otherwise further define it: Code of Ala. § 13A-12-150(1) (a); Ariz. Rev. Stats. § 13-3501-2(a); Ark. Stats. § 41-3585.1(4) (b); Colo. Rev. Stats. § 18-7-101(2) (a); Conn. Gen. Stats. Ann. § 53a-193(a); Del. Code Ann. Title 11 § 1364(1); Hawaii Rev. Stats. § 712-1210(6) (a); Ind. Stats. Ann. § 35-49-2-1(1); Iowa Code Ann. Vol. 55 § 728.4; Kan. Stats. Ann. § 21-4301(2) (a); Ken. Rev. Stats. § 531.010(3) (a); La. Stats. Ann. § 14:106A(3); Maine Rev. Stats. Ann. Title 17 § 2912-2B(1); Ann. Code of Md. Art. 27, § 418 [note: this statute simply uses the word "obscene" but was construed (in *Little Store, Inc. v. State*, 453 A.2d 1215 (Md. 1983)) to require proof of a shameful or morbid interest rather than a mere "lustful interest"]; Mass. Gen. Laws Ann. Chapter 272 § 31; Mich. Stats. Ann. § 28.575(1) and (2) [as construed in *People v. Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (Mich. 1979)]; Minn. Stats. Ann. § 617.241(1) (a); Ann. Mo. Stats. § 573.010(1) (a); Mont. Code Ann. § 45-8-201 (2) (b) (i); Rev. Stats. of Neb. § 28-807(9) (a) [* note: see explanation at end of this footnote]; Nev. Rev. Stats. § 201.235-4 (a); N.J. Stats. Ann. § 2C:34-2-a(1) (c); N.M. Stats. § 30-38-1-B (1); N.Y. Penal Law § 235.00-1(a); Gen. Stats. of N.C. § 14-190.1 (b) (2); N.D. Century Code § 12.1-27.1-01-4-a; Ohio Rev. Code Ann. § 2907.01(F) (1-5) [as construed in *State v. Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255, 261 (Ohio 1978)]; Okla. Stats. Ann. Title 21 § 1024.1-1 and -2(c); Ore. Rev. Stats. § 167.087 (2) (b); Pa. Consol. Stats. Ann. Title 18 § 5903(b); Gen. Laws of R.I. § 11-31-1; Tex. Codes Ann. Title 9 § 43.21(a) (1) (A); Utah Code Ann. § 76-10-1203(1) (a); Vt. Stats. Ann. § 2801(6) (A) [note: this statute only prohibits dissemination of matter "harmful to minors" and, in that context, refers to material which "appeals to the prurient, shameful or morbid interest of minors"]; W.Va. Code § 61-8A-1(7) (a); Wis. Stats. Ann. § 944.21(1) (a) [note: this statute simply uses the word "obscene" with no further definition; however, it was held unconstitutional and unenforceable by the Wisconsin Supreme Court in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (Wis. 1980)]; Wy. Stats. § 6-4-301(a)-(iii) (A).

(Footnote continued on following page)

Of the 50 states, only 3 supply specific definitions of the term "prurient interest" which do not expressly require a finding of a "shameful or morbid" interest.[8] Of these 3 states, two permit a finding of "prurient interest" based upon a mere showing of "lust,"[9] and one defines a prurient interest as "an interest in lewdness or lascivious thoughts."[10]

(Footnote continued from previous page)

*Both the Attorney General's Jurisdictional Statement (at p. 11) and Judge Wallace's dissent in the Ninth Circuit's opinion herein [see p. A-37 of Appendix "A" attached to the Jurisdictional Statement filed by the Attorney General in # 84-143] state that Nebraska's statute defines "prurient interest" as the excitation of "lustful thoughts." However, subsequent to the 1964 statute quoted by Judge Wallace and the Attorney General, the Nebraska Legislature specifically *changed* the definition of "prurient interest" to eliminate any reference to "lustful thoughts" or "lust." Under the new statute, Neb. Rev. Stat. § 28-807(9), the statute refers to material which "appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion . . . ."

[8] *See* Miss. Code Ann. § 97-29-103(1) (a); New Hamp. Rev. Stats. Ann. Chapt. 650:1-IV(a); and Rev. Code of Wash. Ann. § 7.48A.010(8).

[9] Miss. Code Ann. § 97-29-103(1) (a) defines a "prurient interest" as "a *lustful, erotic,* shameful *or* morbid interest in nudity, sex or excretion." (Emphasis added.) [In *Goldstein v. Allain, supra,* 568 F.Supp. 1377, 1385-1386 (N.D.Miss. 1983), app. pending, the Court issued a preliminary injunction against enforcement of the Mississippi statute.] Of course, the Statute herein at issue defines the term "prurient" as "that which incites lasciviousness or lust."

[10] New Hamp. Rev. Stats. Ann. Chapt. 650:1-IV(a).

C. Adoption Of The Washington Statutory Definition Of Obscenity Would Undermine 28 Years Of Supreme Court Opinions By Sanctioning A Return To The Rejected Hicklin Test Which Did Not Require The Application Of Community Standards To The Material "Taken As A Whole" But, Instead, Focused On The Effect Of "Isolated Excerpts" On The Most Susceptible Individuals In The Community.

In addition to its holding that "obscenity" is not constitutionally protected speech, the other equally significant portion of the *Roth* opinion was that it rejected the English common law definition of obscenity as it had been articulated in the then-leading case of *Regina v. Hicklin,* L.R. 3 Queen's Bench 360 (1868). In *Smith v. United States, supra,* this Court recently summarized the importance of *Roth's* rejection of the *Hicklin* test:

> "The phrase 'contemporary community standards' was first used in *Roth v. United States,* [*supra*]. * * * The *Roth* Court explained the derivation and importance of the community standards test as follows:
>
> > 'The early leading standard of obscenity allowed material to be judged merely by the effect of an *isolated excerpt* upon particularly susceptible persons. *Regina v. Hicklin,* [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominent theme of the material *taken as a whole* appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of *isolated passages* upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. * * *' "

(Emphasis added), *Smith v. United States, supra,* 431 U.S. at 300, n. 6.

When *Miller* articulated the current 3-part test for obscenity, it reaffirmed *Roth's* rejection of *Hicklin* by holding that a state could not define obscenity without guaranteeing that the values of the community would be applied to the material *when viewed as a whole.*

Under the *Miller* test, "contemporary community standards" are applied to the first 2 of the 3 parts of the test for obscenity, i.e., "the prurient interest" test and the "patent offensiveness" test. However, what is of critical importance is that *only* the "prurient interest" prong requires that community standards be applied to the material *when viewed as a whole.* By contrast, the "patent offensiveness" portion of the test applies only to *particular depictions* within a given work.[11]

Since *Miller* did *not* require that the "patent offensiveness" portion of the test be judged with reference to the work "taken as a whole," it seems likely that the function of the "(b)" portion is to provide *notice* to disseminators of media materials of the types of conduct which, if represented in a manner beyond the tolerance of a community's standards, *could* subject them to prosecution if the other two portions of the obscenity test are met. Accordingly, the *only* portion of the test which incorporates *Roth's* repudiation of *Hicklin* is the "prurient interest" portion of the test,

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[11] Under *Miller's* "(b)" prong, a juror must engage in a 2-tiered inquiry. First, the juror must determine whether there are any representations of sexual acts as defined in the applicable law contained within the subject work. If the work *does* contain one or more such representation(s), then the second inquiry is whether any of these *isolated* representations is presented in such a way that it exceeds the limits of the community's tolerance and is thus "patently offensive" as measured by contemporary community standards.

because it is only that portion which requires that contemporary community standards be applied to the material *when viewed as a whole.*

The Statute, both on its face and as interpreted by appellants, permits juries to conclude that the "(a)" portion of the test has been met upon a mere showing of "sexual stimulation" without any requirement of finding that the material, when viewed as a whole, appeals to an interest that the average member of the community would consider either shameful, morbid, unhealthy or unwholesome. The critical absence of this requirement from the statutory definition makes Washington's test little different from the *Hicklin* test which lacked any requirement that community standards and values be applied to the material *when viewed as a whole.*

Furthermore, contrary to the apparent suggestion at p. 18 of the Eikenberry brief, the Statute is facially quite clear that material is to be considered "as a whole" *only* under the "prurient interest" and "serious value" portions of the test and *not* under the "patent offensiveness" portion of the test. [A copy of the statute is attached for convenience as Appendix A hereto.]

D. Approval Of Washington's Statute Would Undermine The Settled State Of The Law Of Obscenity, The Creation Of Which Was Miller's Primary Achievement.

In the nearly two decade period between *Roth* and *Miller, supra,* there was unprecendented confusion on the part of both lawmakers and courts throughout the country involving the "intractable problem of obscenity." After *Miller* imposed its "clarifying gloss," there was substantial litigation prompted by the enactment of new obscenity

laws or the judicial construction of old ones. Thereafter, however, a comfortable *status quo* emerged grounded on general acceptance of and familiarity with the *Miller* formulation and its related legal terms of art.

As noted by both appellees and Amicus, the term "prurient interest" now has a well settled judicial meaning as a "shameful or morbid interest" in sex, nudity or excretion.

If this Court were now to redefine "prurient" to eliminate any requirement of perceived "unhealthiness," "unwholesomeness," "shamefulness" or "morbidity," it is likely that most obscenity legislation would again be revised resulting in new rounds of seemingly endless litigation around the country. Although such a result would be beneficial to lawyers, it would substantially undermine the extraordinary homeostasis brought about by *Miller*.

E. Even If This Court Were To Find A Legislative Intent That The Words "Lasciviousness or Lust" Meant A "Shameful or Morbid" Interest (Thereby Interpreting A State Statute Contrary To The Interpretation Given That Statute By State Enforcement Authorities), The Statute Would Still Be Unconstitutional Under The Rule Of Stromberg v. California, 283 U.S. 359 (1931).

As discussed in part A of this Point of Argument, appellants have interpreted the statutory terms "lasciviousness" or "lust" to mean "sexual stimulation," and in so doing have removed from the "a" prong the consideration of whether the average person, applying contemporary community standards, would find the material to be unhealthy, unwholesome, shameful or morbid. As appellants will presumably enforce the Statute consistent with their interpretation of it, their interpretation is controlling in this appeal.

However, if this Court were to reject appellants' stated interpretation and instead interpret the Statute's definition of "prurient" to include some meanings *beyond* mere "sexual arousal,"[12] Amicus' position must then be considered. Specifically, Amicus argued that a jury instructed to define "prurient interest" as "lasciviousness or lust," would *necessarily* conclude that its determination was to be based upon whether the material taken as a whole, would be considered shameful, morbid, unhealthy or unwholesome in light of contemporary community standards. Appellees respectfully submit that the Court of Appeals' treatment of this argument is dispositive. Specifically, whatever meaning the terms "lust" and/or "lasciviousness" may have had in 1957 when *Roth* was decided, they are today considered as "expressing a healthy, wholesome reaction common to millions of well-adjusted persons in our society." 725 F.2d at 490. As the Court also noted:

> "To the contemporary jury, 'lust' is unlikely to connote anything more than 'sexual desire.' *Webster's 3d New International Dictionary* (Unabridged, 3d Ed., 1976); *See also, The Random House Dictionary of the English Language* (Unabridged, 1979) ('lust' defined as 'sexual desire or appetite')." *Id.* at 491.

The Court of Appeals' conclusion that in contemporary usage "lust" no longer necessarily connotes a "shameful or morbid" interest was also reached by the court in *Goldstein v. Allain, supra,* 568 F.Supp. at 1385:

> "The inclusion of the terms lustful and erotic [in the Mississippi anti-obscenity statute's definition of prurient interest] would permit the application of the

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[12] *But see United States v. Thirty Seven Photographs,* 402 U.S. 363, 369 (1971) where this Court held that federal courts do not have the power to authoritatively construe state statutes.

statute to arguably protected materials. Such an intrusion into the area of protected speech is impermissible."

Similarly, the contemporary dictionary definition of the word "lascivious" is:

"1. Of or marked by lust. 2. Exciting sexual desires." *Webster's II New Riverside University Dictionary*, p. 678 (1984).

As shown above, both the relevant dictionary definitions of the words "lust" and "lasciviousness" and the understanding of those words by the lower courts which have considered the issue are that, in contemporary usage, the terms no longer necessarily connote a shameful, morbid, unwholesome or unhealthy interest in sex.[13] Rather, as argued by appellants, they connote mere "sexual stimulation" or "physical desire" which *may also* be deemed to be "shameful" or "morbid" in light of contemporary community values but which will not *necessarily* be so. Amicus' failure to recognize that vast segments of our pluralistic society no longer necessarily find all media which induce feelings of physical arousal to be "shameful" or "morbid"[14] compels the rejection of his argument that a jury instructed in terms of "lasciviousness" or "lust"

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[13] As the Chief Justice recently observed in his dissenting opinion in *Board of Education (Island Trees) v. Pico*, 457 U.S. 853, 885 (1982): "The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world."

[14] Consumption of sexually oriented materials by Americans is unquestionably in the range of hundreds of millions of units annually, and the number of consumed units will apparently increase significantly in years to come. Evidence of these phenomena—in at least one medium—was contained in many

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national magazine articles in 1984 (e.g. "VCRs: Coming On Strong," TIME Magazine, December 24, 1984 (pp. 44-50); "The Crowded New World of TV," FORTUNE Magazine, September 17, 1984 (pp. 156-166); "The Video Revolution" NEWSWEEK Magazine, August 6, 1984 (pp. 50-57).

According to TIME, nearly 17,000,000 American homes—20 percent of all homes with television sets—now have at least one video cassette recorder. TIME, *supra,* at 45.

> "More than 14,000 pre-recorded [video] cassette [titles] are currently on the market . . . (an estimated 7,000 of them X-rated) . . . ." *Id.*
>
> "An estimated 20,000,000 pre-recorded cassettes will be sold in 1984, better than double the number of a year ago." *Id.*
>
> "[A]n estimated 70 percent to 80 percent of [video cassette owners] buy or rent pre-recorded cassettes at least occasionally." *Id.* at 47.
>
> "Consumers will spend about $1.8 billion dollars to rent cassettes this year and about $500 million dollars to buy them . . . . They rent . . . at prices that average around $5.00 a night and are as low as $1.00 in some cities." FORTUNE, *supra,* at 160.
>
> "Hard-core pornography accounts for a hefty share of the cassette business. X-rated movies were among the first to be released for home video and once made up about half of all sales and rentals. That share has dropped to around 15 percent by most industry estimates . . . . [M]any VCR owners . . . will sneak-a-peak at X-rated tapes in . . . their own homes." TIME, *supra,* at 47.
>
> "Tapes like these are lining the shelves of more than 12,000 video specialty stores around the country. Their business is skyrocketing." *Id.*

The market is growing explosively. NEWSWEEK estimates that the total annual revenue generated from video rentals and sale could reach $5 billion dollars in 1988, with "adult" materials accounting for 8 percent of that total. NEWSWEEK, *supra,* at 52.

Certain conclusions may be fairly inferred from the foregoing data. If $1.8 billion dollars was spent on video rentals in 1984 (at an average of $5.00 a tape), of which 15 percent was on adult materials, there were 54,000,000 rentals of adult video tapes in 1984. [In light of the fact that there are many stores where tapes rent for substantially less than $5.00 per tape, it is

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would necessarily understand that it was to make findings of shamefulness or morbidity.

Furthermore, even if there may still be some persons who find *any* arousal of lust or lasciviousness to be, *ipso facto*, shameful or morbid, the existence in common usage of another meaning of those words which is "value-neutral" precludes the certainty that these terms, otherwise unqualified, can constitutionally instruct a jury on the meaning of "prurient interest." As this Court noted in *Stromberg v. California*, 283 U.S. 359 (1931), a conviction cannot be maintained under a statute facially subject to possible unconstitutional application by a jury.

For all the foregoing reasons, the Statute's definition of "prurient interest" cannot be reconciled with this Court's precedent nor with the bulwarks around free expression which the First Amendment was intended to provide.

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likely that the figure of 54,000,000 rentals is substantially *less* than the actual number of adult video cassette rentals in 1984.] Although it is difficult to estimate with any precision the number of people likely to have viewed these 54,000,000 or more rental tapes, any such calculation should take into account the likelihood that most of these tapes were viewed by more than one person. Of course the possibility of multiple rentals by certain consumers should also be considered.

Additionally, if one were to add the absent figures for consumption of sexually oriented materials in other media—e.g. magazines, books, theatrically exhibited motion pictures, 8 millimeter films and pay television—the numbers of units and consumers must be significantly greater than those suggested by the previous calculations.

Finally, the present and anticipated future decline of the adult share of video cassette sales and rentals is indicative of nothing more than the recent entry of non-adult producers and distributors into the previously adult dominated video cassette market. The absolute numbers of adult video tape sales and rentals continue to increase enormously.

II

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFFS HAD STANDING TO CHALLENGE THE OVERBREADTH OF THE STATUTORY DEFINITION OF OBSCENITY.

A. Where, As Here, Plaintiffs Assert That The Overbreadth Of A Statute Chills The Exercise Of Their Own First Amendment Rights (As Opposed To The Rights Of Third Parties Not Before The Court), Traditional Notions Of "Standing" Entitle Plaintiffs To Present Such Claims.

Appellants have injected needless confusion into this appeal by their numerous references to cases discussing standing to raise the rights of third parties not before the Court.[15] Appellees' challenge, however, has never been based upon a reliance on the rights of third parties not before the Court. [Significantly, appellants, notwithstanding their discussion of third party standing, have never alleged that appellees have actually invoked such standing.]

Rather, appellees' First Amendment claims are based on traditional notions of standing entitling a party to challenge elements of a law which impermissibly chill and deter *his own* rights of protected expression. Appellees have alleged that they are engaged in the dissemination of sexually oriented films, books and magazines[16] believed by

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[15] Although never asserting that appellees relied on third party standing, the Eikenberry brief makes 8 different references to the doctrine that, generally, plaintiffs may not assert the right of third parties nor may they complain of the possible invalidity of a statute in hypothetical fact situations absent a showing of "substantial overbreadth" as articulated in *Broadrick v. Oklahoma, supra*. *See* pps. 20-25 of the Eikenberry brief.

[16] Indeed, appellees involved in these seven consolidated cases are representative of almost every type of business that

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might ever be prosecuted under this statute. For example, appellee J. R. Distributors, Inc. owns and operates retail bookstores throughout the state of Washington. These stores sell books, magazines, newspapers, films and videotapes depicting sexual activities and themes to the adult public. [Jt.App. at 30.]

Appellee Spokane Arcades, Inc. operates three bookstores offering books and magazines for sale to the public and, additionally, operates a motion picture arcade on those premises where films can be viewed within coin-operated booths. [Jt.App. at 14-15.]

Appellee Playtime Theatres, Inc. operates an "adult motion picture theater in Spokane, Washington, which is regularly frequented by both married and unmarried couples, as well as single individuals. [See Consolidated Excerpt of Record filed in the Court of Appeals at p. 218.]

Appellee Burns is the executor of an estate which owns and operates a "general audience" motion picture theatre in Oroville, Washington. Some of the motion pictures exhibited there are rated "R" and/or "X" by the MPAA. [See Consolidated Excerpt of Record at 276.]

Appellee Motion Picture Exhibitors of Washington, Alaska and Northern Idaho represents the owners of approximately 95% of the commercial motion picture screens in the state of Washington. At least one member regularly shows a mixture of general release and sexually explicit "x-rated" films. [See Affidavit of M. W. Saffle at p. 2, filed in the District Court for the Eastern District of Washington in no. C-82-283-RJM. This affidavit was designated for the record on appeal although it was not included in the Consolidated Excerpt of Record filed in the Court of Appeals.]

Appellee Madrona Publishers, Inc. is a Washington corporation which, on the basis of annual sales volume, is the largest general publication book manufacturing company in Washington. [See Affidavit of Dan Levant also filed in the District Court in no. C-82-283-RJM. This document was designated for the record on appeal but was not otherwise included in the Consolidated Excerpt of Record.]

Appellee A.C.L.U. of Washington represents approximately 5,000 Washington citizens who allege that this statute, if upheld, would restrict their ability to purchase and/or enjoy non-obscene films and or publications which would otherwise be available to them. [See affidavit of Kathleen Taylor filed in the District Court in no. C-82-283-RJM. This document was also designated for inclusion in the record on appeal but was not included in the Consolidated Excerpt of Record.]

appellees to be constitutionally protected. They have also alleged that, due to their dissemination of such materials, they face a substantial threat of prosecution under the Statute. Furthermore, they have alleged that the definition of obscenity is unconstitutionally overbroad and, as a result, has a chilling and deterrent effect upon their exercise of their own First Amendment rights of Free Speech. Accordingly, plaintiffs have no need to rely upon the "third party" overbreadth standing discussed in *Broadrick* but instead have grounded their challenge on the traditional notion that a party has standing to assert that a statute is unconstitutional as applied to his or her own conduct. *See,* e.g., footnote 16 and the accompanying text appearing in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 217 (1975) [theater manager affirmatively challenged overbroad ordinance regulating drive-in theatres—this Court held that "the deterrent effect of this ordinance is both real and substantial" and that theater manager was asserting "statute's deterrent effect . . . upon him personally; he is not seeking to raise the hypothetical rights of others." *Id.*]

In its most recent discussion of the distinction between this "traditional" type of standing and *Broadrick's* "third party overbreadth" standing, this Court stated:

> "The seminal cases in which the Court held state legislation unconstitutional 'on its face' did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg v. California,* 238 U.S. 359 (1931) and *Lovell v. Griffin,* 303 U.S. 444 (1938), the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. *In cases*

> *of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.* Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of a party before the Court." (Emphasis added), *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* — U.S. —, —, 104 S.Ct. 2118, 2124-2125 (1984).

[*See also* the recent discussion of the inapplicability of the "substantial overbreadth" doctrine to cases like the instant one in *Secretary of State of Md. v. Munson Co.,* — U.S. —, —, 104 S.Ct. 2839, 2851-53 (1984).]

It is respectfully submitted that appellees' standing is the type of "traditional" standing discussed in *Taxpayers for Vincent, supra,* and, as such, is unaffected by the "third party standing" doctrine discussed by appellants.

B. Where, As Here, The Defect In The Statutory Definition Of Obscenity Will Exist In Every Case, Facial Invalidation Is The Appropriate Remedy.

If the Statute's definition of "prurient interest" is unconstitutional, then *every* use of the Statute will employ a definition which affords less protection than that which the First Amendment mandates. In virtually *every* obscenity determination, material which may contain individual offensive and sexually stimulating scenes may nonetheless be found, when *taken as a whole,* not to be considered unhealthy, shameful or morbid when measured by contemporary community standards. Since the Statute deprives individuals of this "constitutional benefit" in *every* circumstance and case arising thereunder, it necessarily follows that the Statute's overbreadth is "substantial" . . . . judged in relation to the statute's plainly legitimate sweep." [*Broadrick, supra,* 413 U.S. at 615.]

This is because the Statute has *no* "legitimate" applications *whatsoever!* Regarding such a circumstance, this Court recently stated:

> "Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise *so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.*" (Emphasis added.) *Secretary of State of Maryland v. Joseph H. Munson Company, Inc., supra,* 104 S.Ct. at 2853.

The Statute's overbreadth could not possibly be *more* substantial. Not only will the overly broad definition of "prurient interest" apply in every trial, but the definition will also likely result in self censorship generally. This is a particularly likely result, where, as here, the potential penalties for the sale or exhibition of "obscene materials" include *unlimited* civil monetary penalties and *severe* criminal felony penalties including a potential 5-year prison sentence (per each count) and a statutorily required *mandatory minimum* fine of $5,000.00 *per count,* as well as a potential maximum fine of $50,000.00 *per count!*[17] Where such *severe*[18] penalties are possible, a statute must

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[17] If, for example, an employee working at one of the bookstores owned by plaintiff J.R. Distributors, Inc., sold 30 copies of a particular month's issue of PLAYBOY Magazine subsequently found obscene at trial, he could be subjected to successive criminal fines of up to $50,000.00 for *each sale* of the 30 copies proven at trial!

[18] The Statute's penalties appear to be by far the most economically punitive in the history of American obscenity legislation.

strictly comply with First Amendment standards to avoid the almost certain result of substantial self censorship.[19] As this Court noted in *New York v. Ferber*, — U.S. —, —, 102 S.Ct. 3348, 3363 (1982): "We recognize, however, that *the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial.*" (Emphasis added.)

In addition to its substantial self censoring impact on disseminators of sexually oriented material, the Statute's overbreadth will also affect decisions of police and prosecutors as to what material should be seized and/or prosecuted. In sum, the overbreadth will affect publishers, producers, distributors, exhibitors, police, prosecutors, judges and juries in *every* use of the Statute.

For all the reasons above, the Court of Appeals correctly concluded that plaintiffs had proper standing to present their First Amendment challenge to the statutory definition of "prurient interest" and that facial invalidation was appropriate because, in *every* case, defendants would be prosecuted pursuant to a definition which gave less protection than that which is guaranteed by the First Amendment.

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[19] In cases of this type, the chilling effect is *presumed*. See *Taxpayers For Vincent, supra,* where the Court stated:

> "[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." 104 S.Ct. at 2126, n.19.

Accord, Joseph Munson Co., supra, 104 S.Ct. at 2853. *See also* the discussion of footnote 16 and the accompanying text from *Erznoznik v. City of Jacksonville, supra* [422 U.S. 205, 217 (1975)], appearing herein at p. 39, *supra*.

III

THE COURT OF APPEALS PROPERLY DECLINED TO SEVER THE UNCONSTITUTIONAL DEFINITION FROM THE STATUTE.

Appellants have unequivocally asserted that the legislative intent was to define "prurient interest" exclusively in terms of mere sexual stimulation or arousal. [See discussion in "Position of Parties," *supra* at pp. 11-12.] Having failed to do so in the Court of Appeals, they argue herein that if their definition of "prurient" is unconstitutional, it should be severed, leaving intact the undefined statutory term of "prurient interest." However, if a federal court were to strike the impermissible portion of the statute, its judgment would necessarily be a holding that the term "prurient interest," standing alone, must be defined as something *other* than mere sexual arousal or stimulation.

Since the Washington Legislature *intended* that the term "prurient interest" convey the concept of stimulation of "sexual longing or desire, without regard to whether the stimulated desire is wholesome or not" [Brockett's brief at 23—additionally see Brockett's brief at 11], severance of the impermissible statutory definition of "prurient interest" [contained in § 1(8) of H.B. 626] would give the Statute a meaning of "prurient interest" significantly different from that intended by the state Legislature.

Since federal courts "lack jurisdiction authoritatively to construe state legislation" [*United States v. 37 Photographs, supra,* 402 U.S. at 369; *accord, Gooding v. Wilson,* 405 U.S. 518, 520 (1972)], it would have been improper for the Court of Appeals to have severed the definition in

§ 1(8) thereby giving the term "prurient interest" a significantly different meaning from that intended by the legislature.

Finally, given that appellants did not argue "severability" in the Court of Appeals, they are precluded from raising it in this Court on appeal.

IV

THE COURT OF APPEALS PROPERLY HELD PULLMAN ABSTENTION INAPPROPRIATE.

Contrary to appellants' arguments, there is *not* an unsettled issue of state law counseling abstention under the rationale of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Appellants have informed this Court that their legislature intended "prurient interest" to mean "that which incites sexual desire or longing" without any additonal requirement of unwholesomeness, etc. [See, e.g., Brockett's brief at 11.] Appellees agree that this is *exactly* what the legislature meant and what the terms "lasciviousness" and "lust" mean as used in § 1(8) of the Statute. Since there is no dispute as to the meaning of the state law, *Pullman* abstention is unwarranted.

Even if appellants have misread the legislature's meaning, appellants *will enforce the statute* consistent with their interpretation that the terms "lasciviousness" and "lust" describe the arousal of mere sexual desire absent any requirement that the material be deemed shameful, morbid, unhealthy or unwholesome. Accordingly, appellees are immediately threatened with enforcement of the Statute as it has been interpreted by appellants, and a federal question has been squarely presented that is ripe for decision.

However, even if this Court should conclude that the statutory meaning is unclear, *Pullman* abstention would *still* be inappropriate because of the need for urgent relief to protect the exercise of First Amendment rights which would be deterred or chilled during the long period necessary to obtain a state court construction and, thereafter, if necessary, for appellees to return to federal court. As noted previously, the Statute's unprecedentedly severe civil and criminal sanctions [see pp. 41-42, *supra*], coupled with the overbroad definition of "prurient interest," would have had an *extremely* substantial deterrent impact upon protected speech had enforcement of the Statute not been enjoined below.

Furthermore, if appellants believed that the legislature intended "prurient interest" to mean a "shameful or morbid" interest, they could long ago have sought such a construction by the state courts in a civil declaratory judgment action. Appellants have not been nor are they now prevented by the federal injunction from seeking such a state court authoritative construction.

Secondly, appellants could also have sought a legislative redefining of "prurient interest." Their failure to pursue either of these two options underscores the absence of statutory ambiguity. The Statute means exactly what appellants say it means, i.e. mere "sexual arousal" and *not* a shameful, morbid, unhealthy or unwholesome interest in sex.

Finally, this Court's opinion in *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965) makes clear that even now, after the issuance of a permanent federal injunction, appellants may still seek an authoritative saving construction of the Statute in a state civil action. Thereafter, as has been

done elsewhere,[20] they may return to the federal court for modification of the permanent injunction.

———o———

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

DATED: January, 1985

Respectfully submitted,

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20 *See, e.g., Yuclan Enterprises, Inc. v. Nakagawa*, 583 F. Supp. 1574 (D.Hawaii 1984) [where, under the authority of F.R.Civ.P. 60(b), the federal court rescinded its prior final judgment which had enjoined enforcement of a Hawaii obscenity statute, following the subsequent ruling of the Hawaii Supreme Court rendering a saving construction of the statute].

Similarly, in *Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1979), *cert. den.* 447 U.S. 923 (1980), a District Court's order preliminarily enjoining enforcement of an Ohio anti-obscenity statute was remanded by the Sixth Circuit Court of Appeals for further consideration after a state court, in a ruling subsequent to the District Court's injunctive order, had rendered a potentially saving construction of the statute.

APPENDIX A

Wash. Sess. Laws, ch. 184, 47th
Legis., HB 626

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexuals acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

NEW SECTION. Section 2. The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(3) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(4) Every place which, as a regular course of business, is used for the purpose of lewdness or prostitution, and every such place in or upon which acts of lewdness or prostitution are conducted, permitted, carried on, continued, or exist.

NEW SECTION. Sec. 3. Any of the following parties may bring a civil action in the superior court of any county where a moral nuisance is alleged to have been maintained:

(1) The prosecuting attorney for the county where the alleged moral nuisance is located;

(2) The city attorney for the city where the alleged moral nuisance is located; or

(3) The attorney general.

The rules of evidence, burden of proof, and all other rules of court shall be the court rules generally applicable to civil cases in this state: PROVIDED, That the standard of proof on the issue of obscenity shall be clear, cogent, and convincing evidence.

NEW SECTION. Sec. 4. (1) No person shall with knowledge maintain a moral nuisance.

(2) Upon a determination that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance.

NEW SECTION. Sec. 5. All civil penalties assessed under section 4 of this act shall be paid into the general treasury of the governmental unit commencing the civil action.

NEW SECTION. Sec. 6. Nothing in this chapter applies to the circulation of any material by any recognized historical society or museum, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 7 RCW.

NEW SECTION. Sec. 8. There is added to chapter 9.68 RCW a new section to read as follows:

A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

NEW SECTION. Sec. 9. If any provision of this act or its applicatoin to any person or circumstance is held invalid, the remainder of the act or the applicatoin of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 10. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.